

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.445 OF 2006

Sadu Bapu Kamble (deceased)
through legal representatives ...Appellants
Vs.
Aba Bhagoji Kamble (deceased)
through legal representatives ...Respondents

Mr A.B. Borkar i/by Mr P.D. Dalvi for the Appellants.
Mr A.R. Shaikh for the Respondent Nos.2-b, 3-a, 4 & 5.

CORAM : A. S. OKA, J.
DATE : APRIL 25, 2006.

P.C.:

1. Heard the learned Advocates appearing for the parties. The Appellants are the original Plaintiffs in a suit for partition and separate possession. The suit was decreed. An Appeal was preferred by the Respondent/Defendant in the District Court which was dismissed for default. In the second Appeal filed by the Respondents, the decree of dismissal of the Appeal by the first Appellate Court was set aside and the first Appellate Court was directed to hear the Appeal on merits. After order of remand was passed by this court, the first Appellate Court by its judgment and decree dated 29th December, 2004 has set aside the decree passed by the Trial Court for partition and the suit has been remanded back to the Trial Court.

2. On the basis of the order of remand, an Application was filed by the Respondents for

restitution as in the meanwhile the decree for partition was executed through the Revenue Authorities. The said Application was dismissed by the Trial Court. By the impugned Judgment and Decree dated 31st January, 2006 the Appeal preferred by the Respondents challenging the order of rejection of Application under section 144 of the Code of Civil Procedure, 1908 (hereinafter referred to as the said Code) was allowed and order of restitution has been passed.

3. Shri Borkar, the learned Advocate appearing for the Appellants submitted that the first Appellate Court while passing order of remand has not set aside the decree on merits. He submitted that decree is set aside as it was passed against the original Defendant Nos.7 and 9 who were already dead before passing the decree. He, therefore, submitted that while passing the order of remand, the finding recorded in the original decree of the Trial Court that the Appellants were having one fourth share in the suit property was not disturbed. He submitted that there is no indication in the order of remand that the first Appellate Court intended to order restitution. The

second submission of Shri Borkar is based on decision of the Apex Court in the case of Mahijibhai Mohanbhai Barot Vs. Patel Manibhai Gokalbhai & Ors. (AIR 1965 Supreme Court Page 1477). He pointed out that the Apex Court has held that an application under section 144 of the said Code is an Application in execution of the decree. Relying upon the said observation of the Apex Court, he submitted that no further Appeal was available to the Respondents for challenging the order passed rejecting the Application under section 144 of the Code. The third submission of Shri Borkar is that as required by provisions of Civil Manual an independent Misc. Application ought to have been filed by the Respondents for restitution and an application which was filed in the suit itself was not maintainable.

4. I have considered the submissions. In so far as the first submission is concerned, right to seek restitution arises when a decree is varied or reversed in any Appeal or revision. In the present case the first Appellate Court has set aside the decree of partition on the basis of which the Appellants were put in possession of their separate share in the suit

properties. On plain reading of section 144 of the said Code the restitution must follow in this case. The finding of the first Appellate Court while setting aside decree for partition is that some of the Defendants were dead and therefore, the decree was nullity. In my view, as a decree passed by the Trial Court for partition was set aside by the Appellate Court, the Respondents were entitled to apply for restitution.

5. The second submission also has no merit.

Merely because Application under section 144 is held to be a proceeding in execution will not take away the right of the Applicant in application under section 144 of the said Code to prefer an Appeal. Section 2(2) of the said Code provides that decree shall be deemed to include determination of any question under section 144 of the said Code. Thus, order passed under section 144 of the said Code is made a decree. Under section 96 of the said Code, an Appeal lies against decrees passed by the court of first instance. It is pertinent to note that merely because Application under section 144 of the Code is a proceeding in execution is no ground to say that no

Appeal will lie. The said Code provides for Appeal against certain orders passed in execution proceedings, viz; adjudication under Order XXI Rule 97 of the said Code is also treated as decree by virtue of Rule 103 of Order XXI of the said Code and therefore, Appeal is provided against such an order.

6. So far as the third submission is concerned, whether an Application for restitution is to be numbered as Misc. Application or an Application in the original suit is purely a procedural matter. If nomenclature of the Application made by the Respondents was not as per the provisions of the Civil Manual, the Application could have been always converted into Misc. Application. Merely because the Application was not described as Misc. Application, it cannot be said that the Application was not maintainable.

7. No fault can be found with order of restitution. There is no merit in the Second Appeal and the same is dismissed. No orders as to costs.

JUDGE